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COURT OF CRIMINAL APPEALS
AUSTIN, TEXAS
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No. _____

In the Court of Criminal Appeals

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COURT OF CRIMINAL APPEALS
1/20/2021
DEANA WILLIAMSON, CLERK

———♦———

No. 14-19-00154-CR
In the Court of Appeals for the Fourteenth Judicial District of Texas at Houston

———♦———

No. 1527611
In the 208th District Court of Harris County, Texas

———♦———

STATE OF TEXAS
v.
JOHN WESLEY BALDWIN

———♦———

STATE'S PETITION FOR DISCRETIONARY REVIEW

———♦———

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ORAL ARGUMENT NOT REQUESTED

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Hon. Denise Collins — Judge presiding at initial hearing

Hon. Greg Glass — Judge presiding in subsequent matters

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STATEMENT REGARDING ORAL ARGUMENT

Pursuant to TEX. R. APP. P. 39, the State does not request oral argument.

TO THE HONORABLE COURT OF CRIMINAL APPEALS OF TEXAS:

STATEMENT OF THE CASE

The appellee was indicted for the offense of capital murder. (C.R. – 10). The appellee filed a motion to suppress evidence obtained from his cellular telephone, his statements, and testimony about that evidence and those statements. (C.R. – 66-73). Following a hearing on the appellee's motion, the Honorable Denise Collins, presiding judge of the 208th District Court, found that the facts set out in the affidavit were insufficient to establish probable cause that the appellee's phone would contain evidence of the capital murder. (II R.R. – 17-18). Judge Collins orally granted the appellee's motion to suppress the evidence obtained from his phone. (II R.R. – 18). The Honorable Greg Glass, the newly-elected presiding judge of the 208th District Court, later issued a written order granting the appellee's motion to suppress in its entirety. (C.R. – 88-96). The State timely filed its notice of appeal from the trial court's order. (C.R. – 97-99); TEX. CODE CRIM. PROC. art. 44.01.

STATEMENT OF PROCEDURAL HISTORY

A panel of the court of appeals issued an opinion in this case reversing the ruling of the trial court on August 6, 2020. *State v. Baldwin*, No. 14-19-00154-CR, ___ S.W.3d ___ (Tex. App.—Houston [14th Dist.] Aug. 6, 2020, op. withdrawn on

reh'g). The court of appeals subsequently granted a timely-filed motion for *en banc* reconsideration by the appellee and withdrew the panel opinion, affirming the decision of the trial court with regard to the sufficiency of the at-issue search warrant affidavit. *State v. Baldwin*, No. 14-19-00154-CR, ___ S.W.3d ___ (Tex. App.—Houston [14th Dist.] Dec. 10, 2020, no pet. h.). The State therefore timely and respectfully brings this petition for discretionary review before this Court pursuant to TEX. R. APP. P. 68.2.

GROUNDS FOR REVIEW

I. **The court of appeals departed from the proper standard of review by substituting its own judgment for that of the magistrate who viewed the warrant affidavit and found probable cause.**

II. **The court of appeals employed a heightened standard for probable cause, departing from the flexible standard required by law.**

ARGUMENT

This petition for discretionary review should be granted because the analysis used by the court of appeals has so far departed from the accepted and usual course of judicial proceedings so as to call for an exercise of this Court's power of supervision. TEX. R. APP. P. 66.3. Specifically, the court of appeals employed the incorrect standard of review with regard to the magistrate's prior finding of probable cause to issue a warrant, and, having usurped the place of the magistrate,

the court of appeals departed from the well-established flexibility of the standard for probable cause. This Court should therefore grant this petition and reverse the decision by the court of appeals.

The court of appeals departed from the proper standard of review by refusing to defer to the magistrate's finding of probable cause and by departing from the well-established, flexible standard for probable cause.[1]

A magistrate's issuance of a search warrant is an implicit finding of probable cause. TEX. CODE CRIM. PROC. art. 18.0215(c)(5)(B). And courts must give great deference to a magistrate's implicit finding of probable cause when reviewing the decision to issue a warrant. *State v. McLain*, 337 S.W.3d 268, 271-72 (Tex. Crim. App. 2011). Appellate review of an affidavit in support of a search warrant is not *de novo*. *State v. Dugas*, 296 S.W.3d 112, 115 (Tex. App.—Houston [14th Dist.] 2009, pet. ref'd). Rather, reviewing courts apply a highly deferential standard of review because of the constitutional preference for searches conducted pursuant to a warrant. *McLain*, 337 S.W.3d at 271.

As long as the magistrate had a substantial basis for concluding that probable cause existed, a reviewing court must uphold the magistrate's probable-cause determination. *McLain*, 337 S.W.3d at 271. A reviewing court may not analyze the affidavit in a hyper-technical manner. *Id*. (citing *Illinois v. Gates*, 462

[1] Because the State's grounds for review are interrelated, the State addresses them simultaneously.

U.S. 213, 236 (1983)). Instead, it must interpret the affidavit in a commonsensical and realistic manner, recognizing that the magistrate may draw reasonable inferences. *Id*.

Probable cause exists when, under the totality of the circumstances, there is a fair probability or substantial chance that contraband or evidence of a crime will be found at the specified location. *McLain*, 337 S.W.3d at 272. This is a "flexible and non-demanding" standard. *Id.*; *accord Rodriguez v. State*, 232 S.W.3d 55, 60 (Tex. Crim. App. 2007). Neither federal nor Texas law defines precisely what degree of probability suffices to establish probable cause. *Rodriguez*, 232 S.W.3d at 61. "Almost certainly, for example, fair probability does not require information that would persuade a reasonable person that the matter is more likely than not." *Id.* at 60 n.21 (internal references omitted).

Probable cause must be found within the four corners of the affidavit supporting the search warrant. *McLain*, 337 S.W.3d at 271. Probability cannot be based on mere conclusory statements of an affiant's belief. *Rodriguez*, 232 S.W.3d at 61. That said, "the training, knowledge, and experience of law enforcement officials is taken into consideration." *Wiede v. State*, 214 S.W.3d 17, 25 (Tex. Crim. App. 2007). Reviewing courts thus allow officers "to draw on their own experience and specialized training to make inferences from and deductions about the cumulative information available to them 'that might elude an untrained

person.'" *United States v. Arvizu*, 534 U.S. 266, 273 (2002) (internal references omitted).

"The inquiry for reviewing courts, including the trial court, is whether there are sufficient facts, coupled with inferences from those facts, to establish a 'fair probability' that evidence of a particular crime will likely be found at a given location." *Rodriguez*, 232 S.W.3d at 62. "The issue is not whether there are other facts that could have, or even should have, been included in the affidavit; [a reviewing court] focus[es] on the combined logical force of facts that *are* in the affidavit, not those that are omitted from the affidavit." *Id.* (emphasis in original).

As stated in the dissent's thorough overview of the facts and law applicable to this case, the affidavit laid out the nexus between the sedan and the capital murder; the affidavit also established a fair probability that evidence of the capital murder would be found in the cellphone. *Baldwin*, ___ S.W.3d ___ at *9-13. While the majority opinion takes issue with the failure of two witnesses to record the license plate number and external accessories of the sedan, the law does not demand such specific details to establish probable cause.

As the dissent noted, "the majority has demanded such a high quantum of proof that nothing less than a hard certainty will suffice. That is plainly not the law." *Id*. at *10 (citing *State v. Elrod*, 538 S.W.3d 551, 557 (Tex. Crim. App. 2017) ("The process of determining probable cause does not deal with hard

certainties, but with probabilities.")). And yet even as the majority demanded additional facts, they ignored existing ones, including facts about the neighborhood and the sedan that illustrated the unlikelihood that the vehicle observed and described by multiple witnesses was anything other than the same sedan. *See Id*. A logical and commonsense reading of the affidavit—the type of reading supported by Texas law—supports the magistrate's finding of probable cause; the majority should have deferred to the magistrate, not supplanted the magistrate. *See Bonds v. State*, 403 S.W.3d 867, 873 (Tex. Crim. App. 2013) ("When in doubt, the appellate court should defer to all reasonable inferences that the magistrate could have made.").

The majority noted that the affidavit contains no particularized evidence connecting the appellee's cellphone to the capital murder. Specifically, the affidavit included a number of abstract statements about the use of cellphones generally, which were based on the affiant's training and experiences. But, as the dissent noted, one statement was pertinent to the magistrate's determination of probable cause. *Baldwin*, ___ S.W.3d ___ at *11. The affiant noted that "[i]t is common for suspects to communicate about their plans via text messaging, phone calls, or through other communication applications." *Id*.

The affiant's statement is pertinent because "[t]he magistrate could have reasonably concluded" that the capital murder here, which was committed by "two

men acting in concert who prepared for the offense over the course of two days," was a "joint activity" that "required a certain level of coordination and communication, the evidence of which might be discovered on a cellphone." *Baldwin*, ___ S.W.3d ___ at *11 (referencing *Foreman v. State*, ___ S.W.3d ___, 2020 WL 6930819, at *4-5 (Tex. Crim. App. 2020) (concluding that a magistrate could reasonably infer that an auto shop was equipped with a video surveillance system because there were other facts in the affidavit showing that the auto shop had a heightened need for security)).

The Fourteenth Court of Appeals has employed comparable reasoning in another recent case. *See Diaz v. State*, 604 S.W.3d 595, 604 (Tex. App.—Houston [14th Dist.] 2020, pet. granted) ("The affidavit stated that two men were involved in the home invasion and that police recovered several parts of one or more cell phones at the scene. From this, the magistrate reasonably could infer that the perpetrators possessed or utilized one or more cell phones before or during the planning or commission of the offense and that any recovered cellphones could have evidence of the offense.").[2]

Here, based on all of the facts in the affidavit, the magistrate had a substantial basis for believing that a search of the appellee's cellphone would probably produce evidence of preparation, which would also include evidence of

the identity of the other person who participated in the capital murder. The affidavit in this case contained sufficient facts to support the magistrate's implied finding of probable cause. Because the dissent in this case, and not the majority, reached the conclusion in line with Texas law and precedent, and because the majority usurped the role of the magistrate and heightened the requirements to establish probable cause, this Court should grant this petition and reverse the judgment of the court of appeals.

[2] This Court granted the petition for discretionary review in the case only as to an issue regarding a confidential informant.

PRAYER FOR RELIEF

It is respectfully requested that this petition be granted and that the decision by the court of appeals be reversed.

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Date: January 9, 2021

Appendix A

State v. Baldwin,
14-19-00154-CR, ___ S.W.3d ___
(Tex. App.—Houston [14th Dist.] Dec. 10, 2020, no pet. h.)

2020 WL 7251909
Only the Westlaw citation is currently available.

Court of Appeals of Texas, Houston (14th Dist.).

The STATE of Texas, Appellant
v.
John Wesley BALDWIN, Appellee

NO. 14-19-00154-CR
|
Opinions filed December 10, 2020

On Appeal from the 208th District Court, Harris County, Texas, Trial Court Cause No. 1527611

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EN BANC MAJORITY OPINION

Frances Bourliot, Justice

***1** This is an interlocutory appeal from an order granting a motion to suppress. In August 2020, a panel of this court reversed the trial court's suppression order as to cellphone evidence and remanded the case to the trial court for further proceedings. Appellee John Wesley Baldwin filed a motion for rehearing and a motion for en banc reconsideration. A majority of the en banc court voted to grant the motion for en banc reconsideration, and the en banc court has reconsidered this appeal. Today, the en banc court withdraws the majority opinion, vacates the judgment of August 6, 2020, and issues this en banc majority opinion and judgment.

We address whether a search-warrant affidavit set forth facts sufficient to establish probable cause for the search of a cellphone. The trial court ruled that the affidavit was insufficient and suppressed all evidence obtained from the cellphone. We affirm.

Background

While committing a robbery, two masked gunmen shot and killed a homeowner. The homeowner's brother witnessed the offense and said the offenders were Black men who fled the scene in a white, four-door sedan. Around that time, a neighbor observed a white, four door sedan exiting the neighborhood at a "very high rate of speed."

Investigators obtained security footage from a nearby residence which showed a white sedan in the neighborhood on the day before (and on the day of) the murder. Four times, the white sedan entered the street, which ended in a cul-de-sac, and circled the neighborhood where the murder later occurred. A neighbor told investigators that a white sedan had passed by his residence three times shortly before the murder. That neighbor could only describe the driver as a "large Black male."

Another neighbor said that she had seen a white, four-door sedan in the neighborhood on the day before the murder. She said she saw two Black men in the sedan. She took a picture of the sedan and captured the sedan's license plate. Based on this information, investigators learned that the sedan in the photo was registered to Baldwin's stepfather, who told investigators that he had sold the sedan to Baldwin and Baldwin was living at his girlfriend's apartment.

Investigators located the sedan at that apartment four days after the murder. Baldwin eventually drove away in the sedan, and investigators followed him in unmarked units but requested a marked unit to develop probable cause to stop Baldwin for a traffic violation. Officers in a marked unit eventually pulled Baldwin over for making an unsafe lane change. Baldwin was arrested for the traffic violation, for driving with an expired license, and for failing to show identification on demand. Investigators also impounded the sedan.

After his arrest, Baldwin gave a statement and consented to a search of the sedan. A cellphone was found in the sedan, but Baldwin would not consent to a cellphone search. Investigators applied for a warrant to search the cellphone, and a magistrate issued the search warrant.

***2** Baldwin moved to suppress the evidence of his statements on the grounds that he did not commit a traffic violation and to suppress the cellphone evidence as fruit of the poisonous tree. Alternatively, Baldwin argued the affidavit in support of the search warrant was legally insufficient to support a finding of probable cause.

The Honorable Denise Collins held a hearing on the motion. After considering the evidence and arguments of counsel, she orally ruled that the traffic stop was lawful and denied the motion to suppress Baldwin's statements. As for the cellphone evidence, Judge Collins determined that the affidavit was insufficient to connect either Baldwin or his cellphone to the murder. Judge Collins ruled that the motion to suppress would be granted in part as to the cellphone evidence, but she did not reduce this ruling or any of her findings to writing before her term of office expired.

The Honorable Greg Glass succeeded Judge Collins. Judge Glass issued a written order on the motion to suppress granting the motion in its entirety without a hearing. Like his predecessor, Judge Glass did not make any written findings. The State brought this interlocutory appeal of Judge Glass's written order, challenging the suppression of the cellphone evidence and Baldwin's statements.

The original court panel set the case for submission with oral argument and raised its own set of concerns. The panel told the parties that the court could not address the sufficiency of the affidavit without first addressing the lawfulness of the traffic stop, because if the traffic stop had been unlawful, then all of the evidence would need to be suppressed under the exclusionary rule. The panel also explained that the court could not determine whether Judge Glass believed that the traffic stop was unlawful or whether he had intended to adopt the finding from Judge Collins that the traffic stop was lawful.

To settle these questions, the panel abated the appeal and remanded the case to Judge Glass with instructions to clarify the scope of his order. Upon remand, Judge Glass held a brief hearing, during which he explained that he had intended to adopt all of Judge Collins's rulings. Judge Glass signed an amended order granting the motion to suppress as to the cellphone evidence only and denying the motion as to Baldwin's statements. Accordingly, the amended order mooted all the State's issues on appeal except for the one concerning the cellphone evidence.

Analysis

The United States Constitution mandates that a warrant cannot issue "but upon probable cause" and must particularly describe the place to be searched and the persons or things to be seized. U.S. Const. amend. IV. The core of this clause and its Texas equivalent is that a magistrate cannot issue a search warrant without first finding probable cause that a particular item will be found in a particular location. *State v. Duarte*, 389 S.W.3d 349, 354 (Tex. Crim. App. 2012) (citing U.S. Const. amend. IV and Tex. Const. art. I, § 9). Probable cause to support issuing a warrant exists when, under the totality of the circumstances, there is a "fair probability" that contraband or evidence of a crime will be found. *Id.* This is a flexible, non-demanding standard. *Id.* But a magistrate's action cannot be a mere ratification of the bare conclusions of others; a magistrate cannot be a rubber stamp. *Id.*

***3** We must conscientiously review the sufficiency of affidavits on which warrants are issued. *See id.* We may uphold a magistrate's probable cause determination only if the magistrate had a substantial basis for concluding that probable cause existed. *State v. McLain*, 337 S.W.3d 268, 271 (Tex. Crim. App. 2011). When the trial court determines whether probable cause supported the magistrate's issuance of a search warrant, there are no credibility determinations, and the trial court is constrained by the four corners of the affidavit. *Id.* Although a magistrate may not baselessly presume facts that the affidavit does not support, he or she is permitted to make reasonable inferences from the facts recited in the affidavit. *Foreman v. State*, No. PD-1090-18, —— S.W.3d ——, ——, 2020 WL 6930819, at *2 (Tex. Crim. App. Nov. 25, 2020). Trial and appellate courts apply a highly deferential standard when reviewing a magistrate's decision to issue a warrant because of the constitutional preference for searches to be conducted pursuant to a warrant. *Id.* On appeal, we must interpret the affidavit in a commonsensical and realistic manner, recognizing that the magistrate may draw reasonable inferences and deferring to all reasonable inferences that a magistrate could have made. *See id.*

Nevertheless, an affidavit offered in support of a warrant to search the contents of a cellphone must "state the facts and circumstances that provide the applicant with probable cause to believe ... searching the telephone or device is likely to produce evidence in the investigation of ... criminal activity."

Tex. Code Crim. Proc. art. 18.0215(c)(5)(B). We have held that such an affidavit "must usually include facts that a cell phone was used during the crime or shortly before or after." *Diaz v. State*, 604 S.W.3d 595, 603 (Tex. App.—Houston [14th Dist.] 2020, pet. granted) (citing *Foreman v. State*, 561 S.W.3d 218, 237-38 (Tex. App.—Houston [14th Dist.] 2018) (en banc) (noting, in dicta, that "an affidavit offered in support of a warrant to search the contents of a cellphone must usually include facts that a cellphone was used during the crime or shortly before or after"), *rev'd*, No. PD-1090-18, —— S.W.3d ——, 2020 WL 6930819 (Tex. Crim. App. Nov. 25, 2020)).

We thus analyze whether there were sufficient facts in the affidavit to establish probable cause that a search of Baldwin's cellphone was likely to produce evidence in the investigation of the murder.[1] *See* Tex. Code Crim. Proc. art. 18.0215(c)(5)(B). The affidavit did not contain any particularized facts connecting a cellphone to the offense, which we have required in other warrant cases involving cellphones. *See, e.g.*, *Diaz*, 604 S.W.3d at 604 (in a case involving burglary during an aggravated assault, the magistrate could reasonably infer the perpetrators "possessed or utilized one or more cell phones before or during the planning or commission of the offense" because "several parts of one or more cell phones [were found] at the scene" and "the intruders' scheme [involved] pretending to be police officers [which] necessitated planning"); *Aguirre v. State*, 490 S.W.3d 102, 116 (Tex. App.—Houston [14th Dist.] 2016, no pet.) (in a case for continuous sexual abuse of a young child, the affidavit established that the defendant had photographed the child complainant with a cellphone); *Walker v. State*, 494 S.W.3d 905, 908–09 (Tex. App.—Houston [14th Dist.] 2016, pet. ref'd) (in a capital murder case, the affidavit established that the defendant and the complainant had discussed the commission of crimes over a cellphone).

I. Facts Surrounding the Offense

The affidavit establishes that the perpetrators left the scene of the offense in a white, four-door sedan. Two neighbors saw a white, four-door sedan in the neighborhood on the day before and the day of the murder. A surveillance video recorded a white sedan in the neighborhood the day before and the day of the murder. There are no facts from which to infer that the witnesses all saw the same sedan or that the surveillance video recorded the same sedan as the one seen by the witnesses. The only fact tying Baldwin to the neighborhood is the photograph of the license plate on his car taken the day before the murder. None of the facts in the affidavit ties Baldwin or the cellphone found in his vehicle to the commission of this or any other offense. At most, the magistrate could infer that Baldwin (or someone driving his car) was in the neighborhood the day before the murder.

***4** The dissent contends that we "refuse[ ] to defer to the magistrate's implied finding [that all three witnesses saw the same sedan] because the first two witnesses did not record a license plate." To the contrary, for the magistrate's implied finding to be reasonable, the warrant application *must* show a correlation between Baldwin's vehicle and the vehicle used in the offense. *See* *Duarte*, 389 S.W.3d at 354. There is no evidence that Baldwin's car, which was in the neighborhood on the day before the murder, was the same car in the neighborhood on the day of the murder and used in the offense. It would strain credulity to conclude in a county with nearly five million people that evidence of a crime probably would be found in someone's car just because he was in the neighborhood on the day before the offense in a car the same color as the one driven by a suspect who also happened to be Black. *See, e.g.*, *Amores v. State*, 816 S.W.2d 407, 412-16 (Tex. Crim. App. 1991) (holding warrantless arrest was not supported by probable cause when police received report of burglary "in progress involving a black male putting something in the trunk of a car," the location of the burglary was at an apartment complex that had numerous previous reports of criminal activity, the officer "within one minute of the report" observed a Black male sitting behind the wheel of a car in the parking lot of the apartment complex, the Black male was about to drive away, and the officer "knew no 'blacks' lived at these apartments"). The warrant application yields no nexus between Baldwin's vehicle and the vehicle at the scene of the offense. *See* *Diaz*, 604 S.W.3d at 603-04 (acknowledging that "facts in the affidavit [must] establish a sufficient nexus between the cell phones [to be searched] and the alleged offense").

In its response to Baldwin's motion for en banc reconsideration, the State relies on *Ford v. State* in an attempt to show a nexus between the white sedan that Baldwin was driving four days after the incident and the white sedan from the incident. However, the car in the *Ford* case was specifically identified (Chevy Tahoe with roof rack and horizontal stripes), and a plethora of other specific facts linked the defendant to the incident, such as DNA, witness

testimony, and surveillance photos of the vehicle on the night of the incident. 444 S.W.3d 171, 193 (Tex. App.—San Antonio 2014), *aff'd*, 477 S.W.3d 321 (Tex. Crim. App. 2015). The dissent takes issue with the fact that we require a description of the vehicle more specific than white, four-door sedan to support probable cause. But that is exactly the point. There is nothing distinctive that would tie Baldwin's white car to the one seen at the offense.

Nothing in this record beyond the color of the sedan, its number of doors, and the race and gender of its driver indicates that the sedan in the affidavit was the same sedan as the one seen in the neighborhood. Without any further information connecting the two vehicles, it is not reasonable to infer that they were one and the same in the third largest county in the country. *Cf.* *Amores*, 816 S.W.2d at 416 (holding lack of description of suspect beyond his gender and race, general description of vehicle, and lack of information regarding source or credibility of information were insufficient facts to support probable cause to believe the suspect had committed a burglary).

II. Reasonableness of Cellphone Search

We discuss the lack of nexus between the sedan and the crime as a significant aspect of the case because it lays the predicate to determine whether there was probable cause to search the cellphone. But our above discussion merely underpins the issue before us: whether it was reasonable for the magistrate to connect the cellphone seized from the vehicle to any evidence of the offense. As for the language in the affidavit regarding cellphones, aside from a brief statement that a cellphone was found in the sedan driven by Baldwin, the rest of the affidavit includes only generic recitations about the abstract use of cellphones. There was no connection between (1) Baldwin's sedan and the vehicle observed leaving the scene of the offense, (2) Baldwin and the offense, or (3) the cellphone and any communication or evidence surrounding the incident. The affiant stated generally that cellphones "are commonly utilized to communicate in a variety of ways such as text messaging, calls, and e-mail or application programs such as google talk or snapchat" and that "it is common for suspects to communicate about their plans via text messaging, phone calls, or through other communication applications."

A cellphone is unique in that it can receive, store, and send the "most intimate details of a person's individual life." *State v. Granville*, 423 S.W.3d 399, 408 (Tex. Crim. App. 2014); *see also* *Riley v. California*, 573 U.S. 373, 386, 134 S.Ct. 2473, 189 L.Ed.2d 430 (2014) ("Cell phones ... place vast quantities of personal information literally in the hands of individuals."). Accordingly, generic, boilerplate language like the language in the affidavit that a smart phone may reveal information relevant to an offense and that suspects might communicate about their plans via cellphone is not sufficient to establish probable cause to seize and search a cellphone. *See Martinez v. State*, No. 13-15-00441-CR, 2017 WL 1380530, at *3 (Tex. App.—Corpus Christi Feb. 2, 2017, no pet.) (mem. op., not designated for publication) (citing *U.S. v. Ramirez*, 180 F. Supp. 3d 491, 494 (W.D. Ky. 2016)); *see also* *Duarte*, 389 S.W.3d at 360 (holding boilerplate affidavit containing insufficient particularized facts did not allow magistrate to determine probable cause to issue a search warrant).

***5** Under the dissent's reasoning, any time more than one person is involved in a crime, police officers would have probable cause to search a cellphone. That is not the law in Texas. Our binding precedent requires a connection between cellphone usage and the offense. *See, e.g.,* *Diaz*, 604 S.W.3d at 604 (involving cellphone parts found at location of offense and evidence that suspects planned to impersonate officers); *Walker*, 494 S.W.3d at 909 ("A substantial basis for probable cause rests in the allegations that appellant and the complainant had been communicating via appellant's cell phone, planning robberies around the time that the complainant was killed while being robbed of possessions later found in appellant's possession."). The dissent states that boilerplate language is enough to establish probable cause when "coupled with other facts," but the only other fact in this case is that two Black men committed the offense together.[2] No other Texas case cited by the dissent goes so far as to hold that the only "other fact" needed is that two suspects were involved in planning an offense. For example, in *Diaz*, a case relied on by the dissent, several cellphone parts were found at the scene, tying at least one cellphone to the offense. 604 S.W.3d at 604. Similarly, in *Walker*, a capital murder case, the suspect "exchanged numerous text messages and phone calls with the complainant around the time of the shooting," tying a cellphone to the murder. 494 S.W.3d at 909. Here, *no facts* tie a cellphone to the offense. There are no facts showing "that a cell phone was used during the crime or shortly before or after," which we have noted is usually required to support a finding of probable cause.

Compare *Diaz*, 604 S.W.3d at 603, *with* *Foreman*, —— S.W.3d at ——, 2020 WL 6930819, at *5 (holding magistrate could reasonably infer auto shop had a video surveillance system because "concrete indications" in the affidavit showed the business had "a unique need for security on its premises and had in fact deployed some security measures").

While magistrates may draw reasonable inferences from the words contained within the four corners of the affidavit, if too many inferences are drawn, "the result is a tenuous rather than a substantial basis for the issuance of a warrant." *Davis v. State*, 202 S.W.3d 149, 157 (Tex. Crim. App. 2006). In this case, the nexus between the vehicle that Baldwin was driving and the vehicle seen at the crime is tenuous at best. Extending that nexus to include Baldwin's cellphone based on nothing more than a recitation that it is common for people to communicate their plans via text messaging, phone calls, or other communication applications would be extending the reach of probable cause too far.

Considering the totality of the circumstances, we conclude that the affidavit did not contain sufficient facts to establish a fair probability that a search of the cellphone found in Baldwin's vehicle would likely produce evidence in the investigation of the murder.

Conclusion

We affirm the trial court's order granting the motion to suppress evidence obtained from the cellphone found in Baldwin's vehicle.

En Banc Court consists of Chief Justice Frost and Justices Christopher, Wise, Jewell, Bourliot, Zimmerer, Spain, Hassan, and Poissant. Justice Bourliot authored an En Banc Majority Opinion, which Justices Spain, Hassan, and Poissant joined in full, and which Justice Zimmerer joined as to Part II. Justice Zimmerer authored an En Banc Concurring Opinion. Justice Christopher authored an En Banc Dissenting Opinion, which Chief Justice Frost and Justices Wise and Jewell joined.

EN BANC CONCURRING OPINION

Jerry Zimmerer, Justice

In this interlocutory appeal from an order granting a motion to suppress the majority concludes the search warrant affidavit did not contain sufficient facts to establish a fair probability that a search of the cellphone found in Baldwin's vehicle would likely produce evidence in the investigation of the murder. En route to that conclusion the majority analyzes the nexus between Baldwin's vehicle and the offense and concludes there was no nexus between Baldwin's vehicle and the alleged capital murder. I disagree with the majority's conclusion that there was no nexus between Baldwin's vehicle and the offense. Because I agree with the majority's conclusion that the search warrant affidavit did not establish a nexus between criminal activity and the cellphone I concur in the court's judgment.

***6** The background facts are sufficiently stated in the en banc majority and dissenting opinions. I write separately to address the trial court's ruling on probable cause and reasonable inferences.

I agree with the dissent's analysis with regard to the nexus between the vehicle Baldwin was driving and the alleged offense [1]. As noted by the dissent, however, that does not end our analysis. Relying on *Riley v. California*, 573 U.S. 373, 401, 134 S.Ct. 2473, 189 L.Ed.2d 430 (2014), which addressed the warrantless search of a cellphone incident to arrest, the dissent correctly notes that the evidence showing a nexus between the vehicle and the alleged offense is not sufficient by itself to support the search of the cellphone. There must have been additional facts in the affidavit establishing probable cause that a search of the cellphone would likely produce evidence in the investigation of the capital murder. *See* Tex. Code Crim. Proc. art. 18.0215(c)(5)(B).

We normally review a trial court's motion-to-suppress ruling under a bifurcated standard of review, under which we give almost total deference to the trial court's findings as to historical facts and review de novo the trial court's application of the law. *State v. McLain*, 337 S.W.3d 268, 271 (Tex. Crim. App. 2011). However, when the trial court determines probable cause to support the issuance of a search warrant, credibility is not at issue; rather, the trial court grants or denies a motion to suppress based on what falls within the four corners of the affidavit. *Id.* When reviewing a magistrate's decision to issue a warrant, appellate courts as well as trial courts apply a highly deferential standard of review because of the constitutional preference for searches conducted under a warrant over warrantless searches. *Id.* As long as the

magistrate had a substantial basis for concluding that probable cause existed, we will uphold the magistrate's probable-cause determination. *Id.* We are not to view the affidavit through hypertechnical lenses; instead, we must analyze the affidavit with common sense, recognizing that the magistrate may draw reasonable inferences from the facts and circumstances contained in the affidavit's four corners. *Id.* When in doubt, we defer to all reasonable inferences that the magistrate could have made. *Id.* at 272; *see also Foreman v. State*, Nos. PD-1090-18; PD-1091-18, —— S.W.3d ——, ——, 2020 WL 6930819 at *3 (Tex. Crim. App. Nov. 25, 2020).

Although no single rubric definitively resolves which expectations of privacy are entitled to protection under the Fourth Amendment to the United States Constitution, the analysis is informed by historical understandings of what was deemed an unreasonable search and seizure when the Fourth Amendment was adopted. *Carroll v. United States*, 267 U.S. 132, 149, 45 S.Ct. 280, 69 L.Ed. 543 (1925). On this score, the Supreme Court has recognized that the Fourth Amendment seeks to secure "the privacies of life" against "arbitrary power." *Boyd v. United States*, 116 U.S. 616, 630, 6 S.Ct. 524, 29 L.Ed. 746 (1886). Second, and relatedly, the Court recognized that a central aim of the Framers was "to place obstacles in the way of a too permeating police surveillance." *Carpenter v. United States*, —— U.S. ——, 138 S. Ct. 2206, 2213–14, 201 L.Ed.2d 507 (2018) (quoting *United States v. Di Re*, 332 U.S. 581, 595, 68 S.Ct. 222, 92 L.Ed. 210 (1948)).

***7** The Fourth Amendment, as well as Article 1, section 9 of the Texas Constitution, requires that a warrant affidavit establish probable cause to believe a particular item is at a particular location. *Jennings v. State*, 531 S.W.3d 889, 892 (Tex. App.—Houston [14th Dist.] 2017, pet. ref'd). The core of the Fourth Amendment's warrant clause and article I, section 9, of the Texas Constitution is that a magistrate may not issue a search warrant without first finding probable cause that a particular item will be found in a particular location. *State v. Duarte*, 389 S.W.3d 349, 354 (Tex. Crim. App. 2012); *see* U.S. Const. amend. IV; Tex. Const. art. I, § 9. Under the Fourth Amendment, probable cause exists when, under the totality of the circumstances, there is a fair probability or substantial chance that contraband or evidence of a crime will be found at a specified location. *Bonds v. State*, 403 S.W.3d 867, 873 (Tex. Crim. App. 2013); *Long v. State*, 525 S.W.3d 351, 366 (Tex. App.—Houston [14th Dist.] 2017, pet. ref'd) (citing *Illinois v. Gates*, 462 U.S. 213, 238, 103 S.Ct. 2317, 76 L.Ed.2d 527 (1983)). This standard is "flexible and nondemanding." *Bonds*, 403 S.W.3d at 873.

Probable cause must be found within the "four corners" of the affidavit supporting the search warrant. *McLain*, 337 S.W.3d at 271. Magistrates are permitted to draw reasonable inferences from the facts and circumstances contained within the four corners of the affidavit. *Davis v. State*, 202 S.W.3d 149, 154 (Tex. Crim. App. 2006). However, "[w]hen too many inferences must be drawn, the result is a tenuous rather than substantial basis for the issuance of a warrant." *Id.* at 157. Probability cannot be based on mere conclusory statements of an affiant's belief. *Rodriguez v. State*, 232 S.W.3d 55, 61 (Tex. Crim. App. 2007). A reviewing court's assessment of the affidavit's sufficiency is limited to "a reasonable reading" within the four corners of the affidavit while simultaneously recognizing the magistrate's discretion to draw reasonable inferences. *Duarte*, 389 S.W.3d at 354.

The Court of Criminal Appeals has observed that "a cell phone is unlike other containers as it can receive, store, and transmit an almost unlimited amount of private information" that "involve[s] the most intimate details of a person's individual life, including text messages, emails, banking, medical, or credit card information, pictures, and videos." *State v. Granville*, 423 S.W.3d 399, 408 (Tex. Crim. App. 2014). Because such information may or may not be "associated with criminal activity," depending on the circumstances, the State must prove on a case-by-case basis that the incriminating nature of the cell phone was immediately apparent to the officers who seized it, based on the facts and circumstances known to the officers at the moment the phone was seized.

"Regarding computers and other electronic devices, such as cell phones, case law requires that warrants affirmatively limit the search to evidence of specific crimes or specific types of materials." *Diaz v. State*, 604 S.W.3d 595, 605 (Tex. App.—Houston [14th Dist.] 2020, pet. granted). In *Diaz*, this court found the search warrant affidavit sufficiently connected the cellphone with the offense being investigated. *Id.* at 604 ("The affidavit stated that two men were involved in the home invasion and that police recovered several parts of one or more cell phones at the

scene. From this, the magistrate reasonably could infer that the perpetrators possessed or utilized one or more cell phones before or during the planning or commission of the offense and that any recovered cell phones could have evidence of the offense."). In coming to that conclusion, however, the court did not rely on the affiant's assertions that "the majority of persons, especially those using cellular telephones, utilize electronic and wire communications almost daily" or that "individuals engaged in criminal activities utilize cellular telephones and other communication devices to communicate and share information regarding crimes they commit." *Id.* The *Diaz* court found sufficient probable cause in the affidavit absent those broad generalizations. *Id.*

***8** This court has consistently followed the same analysis with regard to cellphone searches recognizing facts stated in the affidavits that connected the cellphone to be searched with the offense alleged. *See* *Walker v. State*, 494 S.W.3d 905, 908–09 (Tex. App.—Houston [14th Dist.] 2016, pet. ref'd) (affidavit stated that defendant admitted shooting complainant and that defendant and complainant communicated by cellphone and exchanged messages and phone calls around the time of the shooting); *Aguirre v. State*, 490 S.W.3d 102, 116–17 (Tex. App.—Houston [14th Dist.] 2016, no pet.) (affidavit stated that cellphone was used to photograph child complainant in child sexual assault prosecution); *Humaran v. State*, 478 S.W.3d 887, 899 (Tex. App.—Houston [14th Dist.] 2015, pet. ref'd) (affidavit identified defendant's disturbance call as the reason that sheriff's deputies were initially dispatched to the scene and stated that defendant acted with another person to destroy evidence).

The State relies on *Thomas v. State*, No. 14-16-00355-CR, 2017 WL 4679279, at *4 (Tex. App.—Houston [14th Dist.] Oct. 17, 2017, pet. ref'd) (mem. op. not designated for publication)[2] and *Checo v. State*, 402 S.W.3d 440, 448 (Tex. App.—Houston [14th Dist.] 2013, pet. ref'd) each of which relied on affidavits with more specific facts than in this case. In *Thomas*, the affidavit noted that a cellphone was found in a vehicle connected to an armed robbery and that phone calls had been exchanged between co-defendants in which one of the co-defendants admitted that he "hit a lick," which is street slang for robbery, and that the police had caught a co-defendant. 2017 WL 4679279 at *3. In upholding the sufficiency of the affidavit to support the search of the cellphone this court referenced use of the phone to report the robbery and a co-defendant being caught. *Id.* at *4. In *Checo*, this court upheld the sufficiency of an affidavit to support search of a computer for child pornography. 402 S.W.3d at 449–50. The affidavit in *Checo* not only relied on the affiant's training and experience that child pornographers kept child pornography on computers, but also stated that a complainant reported the defendant showing child pornography to her on a computer. *Id.* at 448.

Each of the cases from this court cited by the State and by the dissent contained more particular facts tying the cellphone to the alleged offense than the affidavit in this case. The "bare bones" affidavit in this case lacks sufficient indicia of probable cause because it fails to establish a nexus between the specific crime for which evidence is sought and the cellphone to be searched. The affidavit in this case goes no further than broad statements that "criminals often use cellphones," and "criminals often make plans on cellphones." The dissent recognizes that these broad generalizations "exemplif[y] the sort of generalization that does not suffice to establish probable cause, at least under contemporary standards where cellphones are still used by nearly everyone, law-abiding or not."

***9** Having analyzed the affidavit with common sense, recognizing that the magistrate may draw reasonable inferences from the facts and circumstances contained in the affidavit's four corners and deferring to all reasonable inferences that the magistrate could have made, I agree with the en banc majority's conclusion that the affidavit did not contain sufficient facts to establish a fair probability that a search of the cellphone found in Baldwin's vehicle would likely produce evidence in the investigation of the murder. The affiant provided no facts that a cellphone was used during commission of the offense either directly or indirectly such that the magistrate could reasonably infer that evidence of the crime could be found on the cellphone. With these thoughts, I concur in that portion of the en banc majority opinion addressing search of the cellphone.

EN BANC DISSENTING OPINION

Tracy Christopher, Justice

Broadly speaking, there are two errors with the majority's analysis. First, there is no adherence to the standard of review. The majority has simply supplanted its own judgment for that of the magistrate. And second, there is no adherence

to the standard for probable cause. Rather than apply the flexible and non-demanding standard that the law requires, the majority has imposed a rigid and unrealistic standard that will undo all of the dutiful efforts of law enforcement to obtain a search warrant through the proper channels.

I. The Magistrate's Decision

By issuing the search warrant, the magistrate implicitly found that there was probable cause to believe that a search of Baldwin's cellphone would likely produce evidence in the investigation of the homeowner's capital murder. *See* Tex. Code Crim. Proc. art. 18.0215(c)(5)(B). That implied finding was based on the following facts, all of which appear within the search-warrant affidavit:

1. The cellphone was found in Baldwin's sedan four days after the capital murder.

2. There was a nexus between the sedan and the capital murder, which supported a finding that Baldwin participated in the capital murder.

3. Based on the affiant's training and experience, criminals often use cellphones to coordinate their activities, which was significant here because the capital murder was committed by two individuals who planned their offense over at least two days.

The majority takes no issue with the first of these points, but the majority dismisses the second and third points, along with the legal precedent that attaches to them.

II. The Nexus Between the Sedan and the Capital Murder

The affidavit compiles the statements of three different witnesses who set forth the following facts about the sedan:

1. According to the homeowner's brother, who witnessed the capital murder, the two masked gunmen fled the scene in a white, four-door sedan.

2. According to a neighbor, there was a white, four-door sedan that was circling the neighborhood several times in the hours just before the capital murder. This neighbor's statement was corroborated by security footage.

3. According to a separate neighbor, there was a white, four-door sedan that was circling the neighborhood several times on the day before the capital murder. This neighbor was so alarmed by the sedan that she took a picture of it, and her picture captured the sedan's license plate.

The magistrate considered this evidence and made an implied finding that all three witnesses saw the same sedan, which was positively linked to Baldwin through the license plate. That implied finding is entitled to deference because a reasonable person could conclude that the separate sightings were too similar and too coincidental to be unrelated.

Yet the majority refuses to defer to the magistrate's implied finding because the first two witnesses did not record a license plate. The majority also characterizes the magistrate's implied finding as unreasonable because the first two witnesses only provided a general description of a sedan and, under the majority's restrictive view, their statements cannot be unified with the statements of the third witness unless there are more specific descriptions regarding the sedan, like whether it had a roof rack or horizontal stripes.

***10** The majority's standard for probable cause cannot be reconciled with our jurisprudence. The standard is supposed to be "flexible and non-demanding." *See State v. McLain*, 337 S.W.3d 268, 272 (Tex. Crim. App. 2011). But the majority has demanded such a high quantum of proof that nothing less than a hard certainty will suffice. That is plainly not the law. *See State v. Elrod*, 538 S.W.3d 551, 557 (Tex. Crim. App. 2017) ("The process of determining probable cause does not deal with hard certainties, but with probabilities.").

At the same time that the majority criticizes the so-called lack of evidence, the majority turns a blind eye to the portion of the affidavit that demonstrates the sheer unlikelihood that the witnesses saw three different sedans. This portion discusses the design of the neighborhood, which is described as having only a single point of ingress and egress. The affidavit further indicates that, once inside the neighborhood, there is just a single "circling boulevard with multiple small cul-de-sacs" branching out from that main boulevard.

These facts about the neighborhood support the following inferences:

1. Because thru traffic is not possible in this neighborhood, there is a reasonable probability that the vehicles seen most frequently there belong to the residents of the neighborhood, which would also tend to explain

why two separate neighbors became suspicious of an unfamiliar sedan circling the area.

2. Because the neighbors' suspicions were raised on two consecutive days about sedans that were similar in appearance, there is a reasonable probability that the neighbors witnessed the same sedan, and that its driver was deliberately circling the neighborhood in preparation for the capital murder.

3. Because the sedan was positively linked to Baldwin through the license plate, there is a reasonable probability that Baldwin was the driver witnessed by the homeowner's brother and that Baldwin participated in the capital murder.

All of these inferences stem from a logical and common-sense reading of the affidavit, which is how reviewing courts are supposed to approach the magistrate's determination of probable cause. *See* *Bonds v. State*, 403 S.W.3d 867, 873 (Tex. Crim. App. 2013). By not deferring to these reasonable inferences, the majority has usurped the role of the magistrate.

III. The Cellphone

The evidence showing that Baldwin participated in the capital murder is not sufficient by itself to support the search of his cellphone. *Cf.* *Riley v. California*, 573 U.S. 373, 401, 134 S.Ct. 2473, 189 L.Ed.2d 430 (2014) (holding that the warrantless search of a cellphone cannot be supported under the doctrinal exception for searches incident to arrest). There must have been some additional evidence in the affidavit establishing probable cause that a search of the cellphone would likely produce evidence in the investigation of the capital murder. *See* Tex. Code Crim. Proc. art. 18.0215(c)(5)(B).

As to this point, the majority correctly observes that the affidavit does not contain any particularized evidence connecting Baldwin's cellphone to the capital murder. For example, there is no indication that the cellphone was used to film the capital murder as it was being committed, or that the cellphone had been used to communicate with the homeowner before the capital murder. The affidavit only contains generic recitations about the abstract use of cellphones.

These recitations were all based on the affiant's "training and experience," and included such generalizations as the following:

***11** 1. "Phones and smartphones such as the one listed herein are capable of receiving, sending, or storing electronic data."

2. Such phones are capable of containing "evidence of their [user's] identity and others."

3. "Cellular telephones are commonly utilized to communicate in a variety of ways such as text messaging, calls, and e-mail or application programs such as google talk or snapchat."

4. "It is common for suspects to communicate about their plans via text messaging, phone calls, or through other communication applications."

5. "Someone who commits the offense of aggravated assault or murder often makes phone calls and/or text messages immediately prior and after the crime."

6. "Often times, in a moment of panic and in an attempt to cover up an assault or murder[,] suspects utilize the internet via their cellular telephone to search for information."

7. "Searching a suspect's phone will allow law enforcement officers to learn the cellular telephone number and service provider for the device."

8. "Law enforcement officers can then obtain a subsequent search warrant from the cellular telephone provider to obtain any and all cell site data records, including any and all available geo-location information for the dates of an offense, which may show the approximate location of a suspect at or near the time of an offense."

For the most part, these statements are just "boilerplate recitations designed to meet all law enforcement needs for illustrating certain types of criminal conduct," and affiants should not rely on such generalizations because they run the risk "that insufficient particularized facts about the case or the suspect will be presented for a magistrate to determine probable cause." *See* *United States v. Weaver*, 99 F.3d 1372, 1378 (6th Cir. 1996).

The fifth statement listed above, which could just as easily be rephrased as "criminals often use cellphones," exemplifies the sort of generalization that does not suffice to establish probable cause, at least under contemporary standards where cellphones are still used by nearly everyone, law-abiding or

not. *See* *Riley*, 573 U.S. at 385, 134 S.Ct. 2473 ("These cases require us to decide how the search incident to arrest doctrine applies to modern cell phones, which are now such a pervasive and insistent part of daily life that the proverbial visitor from Mars might conclude they were an important feature of human anatomy.").

Despite the breadth of these generic recitations, the fourth statement listed above is pertinent to the magistrate's determination of probable cause. This statement establishes that criminal suspects use cellphones for planning purposes, and that fact has some bearing here because the affidavit established that the capital murder was committed, not by a lone wolf, but by two men acting in concert who prepared for the offense over the course of two days. The magistrate could have reasonably concluded that this joint activity required a certain level of coordination and communication, the evidence of which might be discovered on a cellphone. *Cf.* *Foreman v. State*, —— S.W.3d ——, ——, 2020 WL 6930819, at *4–5 (Tex. Crim. App. 2020) (concluding that the magistrate could reasonably infer that an auto shop was equipped with a video surveillance system because there were other facts in the affidavit showing that the auto shop had a heightened need for security).

***12** The majority rejects the significance of the fourth statement listed above, supposedly under the belief that all boilerplate language is insignificant under *Martinez v. State*, No. 13-15-00441-CR, 2017 WL 1380530, at *3 (Tex. App.—Corpus Christi Feb. 2, 2017, no pet.) (mem. op., not designated for publication). Setting aside for the moment that *Martinez* is an unpublished decision that has no precedential value, the majority misrepresents the actual holding of that case. The *Martinez* court did not hold that an affidavit containing boilerplate language was insufficient to support the magistrate's finding of probable cause. Quite the opposite, that court determined that an affidavit was sufficient to support the search of a cellphone because, in addition to certain boilerplate language regarding the abstract use of cellphones, there were facts in the affidavit showing that the defendant had committed the offense with other individuals, and there was some indication that these individuals had used cellphones to communicate with one another. The court only indicated that boilerplate language would be insufficient to support a finding of probable cause when such language was "standing alone," which was not the case there (or here).

Rather than suggest that boilerplate language is insignificant, the majority should have recognized the true holding of *Martinez*, which is that boilerplate language about cellphones can be considered in an analysis of probable cause when it is coupled with other facts, especially facts showing that the suspect committed an offense with another individual.

This reasoning is not novel. A court in another jurisdiction has already articulated a clear and objective test for this exact circumstance, stating that "an affidavit establishes probable cause to search a cell phone when it describes evidence of criminal activity involving multiple participants and includes the statement of a law enforcement officer, based on his training and experience, that cell phones are likely to contain evidence of communications and coordination among these multiple participants." *See* *United States v. Gholston*, 993 F. Supp. 2d 704, 720 (E.D. Mich. 2014).

That test was applied in another capital murder case, with facts very similar to the facts of this case. *See* *Johnson v. Arkansas*, 2015 Ark. 387, 472 S.W.3d 486, 490 (2015) ("Here, because Johnson was working with at least one other person when the homicide was committed, it is reasonable to infer that the cell phone that was in his possession was used to communicate with others regarding the shootings before, during, or after they occurred.").

A version of this test was applied in a separate case that contained many of the same boilerplate recitations as the affidavit in this case, though the result was different there because the facts did not show that the defendant had committed the offense with another individual. *See* *United States v. Oglesby*, No. 4:18-CR-0626, 2019 WL 1877228, at *4 (S.D. Tex. Apr. 16, 2019) (holding that a "bare bones" affidavit was insufficient to support a finding of probable cause because the affidavit contained no statements "directly referencing another individual's involvement in the incident").

Our court recently applied this test as well, but only through its reasoning, rather than expressly. *See* *Diaz v. State*, 604 S.W.3d 595, 604 (Tex. App.—Houston [14th Dist.] 2020, pet. granted) ("The affidavit stated that two men were involved in the home invasion and that police recovered several parts of one or more cell phones at the scene. From this, the magistrate reasonably could infer that the perpetrators possessed or utilized one or more cell phones before or during the planning or commission of the offense and that any recovered cell phones could have evidence of the offense."). [1]

***13** The reasoning in these collected authorities applies equally here. Based on all of the facts in the affidavit, the magistrate had a substantial basis for believing that a search of Baldwin's cellphone would probably produce evidence of preparation, which would also include evidence of the identity of the other person who participated in the capital murder.

For all of these reasons, I would conclude that the affidavit contained sufficient facts to support the magistrate's implied finding of probable cause. Because the majority reaches the opposite conclusion, I respectfully dissent.

All Citations

--- S.W.3d ----, 2020 WL 7251909

Footnotes

1 An affidavit offered in support of a warrant to search the contents of a cellphone must also state the facts and circumstances that provide the officer with probable cause to believe that "criminal activity has been, is, or will be committed." Tex. Code Crim. Proc. art. 18.0215(c)(5)(A). The parties do not dispute that a murder was committed, and we do not address this issue as it is unnecessary to our disposition of the case.

2 The dissent says that "the capital murder was committed by two individuals who planned their offense over at least two days" but points to no evidence that the suspects planned the offense over at least two days other than the fact that Baldwin's white sedan was seen in the neighborhood the day before the offense.

1 The affidavit references twice to a "white 4-door sedan", once to "a white, 4-door Lexus vehicle, bearing Texas license plate #GTK-6426," once to "a white, 4-door vehicle, similar in appearance to the white Lexus registered under license plate GTK-6426," and once to "the vehicle" when referring to a vehicle observed to have circled three times in front of the crime scene. Known to the citizen informants, and to police, was distinctive body damage including a two to three foot gash in the right quarter panel and a distinctive dent on the rear facing portion of the trunk. However, since the facts describing the distinctive nature of the vehicle were not included in the affidavit, this specificity is not included in our analysis of the magistrate's knowledge.

2 We are not bound by this unpublished decision in a criminal case, *see* Tex. R. App. P. 47.7(a), but address it here because the State cited it in support of its argument that the trial court erred in granting the motion to suppress.

1 The petitioner in *Diaz* asserted two grounds for discretionary review. The first ground concerned a confidential informant and a challenge under *Franks v. Delaware*, 438 U.S. 154, 98 S.Ct. 2674, 57 L.Ed.2d 667 (1978); and the second ground concerned a sufficiency challenge to the search-warrant affidavit. *See Diaz v. State*, No. PD-0712-20 (filed Aug. 11, 2020). The Court of Criminal Appeals granted the petition on the first ground only.